FILE COPY.

Supreme Court of the United States.

No. 15 ORIGINAL.

Ex parte, THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF PROHIBITION, MANDAMUS AND CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Office Supreme Court, U. S.
FILED
JAN 3 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Ex parte, THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AND FOR A WRIT OF CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Now comes the Commonwealth of Massachusetts and moves that leave be granted it to file in the Supreme Court of the United States a petition for a writ of prohibition to the judges of the Supreme Court of the District of Columbia, restraining the said judges from proceeding further in a certain equity suit pending in said court, whereof said court has not jurisdiction, entitled "John B. Cotton, complainant, *v.* Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts," numbered 25032; and for a writ of mandamus commanding the said judges to dismiss said suit; and for a writ of certiorari to bring up the record of said suit; and that a rule may be issued out of this court to the said judges commanding them, upon a day to be fixed in said rule, to show cause in this court why the said writs of prohibition, mandamus and certiorari should not issue as prayed.

HERBERT PARKER,
Attorney-General of Massachusetts.

Supreme Court of the United States.

No. October Term, 1904.

Original.

In re THE COMMONWEALTH OF MASSACHUSETTS, Petitioner.

PETITION FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AND FOR A WRIT OF CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of the Commonwealth of Massachusetts, one of the States of the United States, respectfully shows: —

1. On July 18, 1899, an agreement was entered into between Roger Wolcott, Governor of Massachusetts, acting in behalf of said Commonwealth, and John B. Cotton, of Washington, D. C., by the terms of which said Cotton was declared to be appointed agent and attorney of the Commonwealth of Massachusetts to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States a claim of the Commonwealth of Massachusetts against the United States, arising by virtue of the act approved July 27, 1861, entitled "An Act to indemnify the States for expenses incurred by them in the defence of the United States." By the terms of said agreement said Cotton

was to receive a compensation of 10 per cent. of the entire sum collected, payable only out of any sums that might be collected thereunder. Said agreement is set forth by entire copy thereof hereinafter on page 18, being a part of Exhibit B, and is made a part hereof.

2. In partial satisfaction of said claim of the Commonwealth of Massachusetts against the United States, Congress, by an act approved on the twenty-seventh day of April, 1904, appropriated to the Commonwealth of Massachusetts $1,611,740.85. Thereafter, on the second day of May, 1904, the Treasury Department of the United States issued a warrant in favor of the Governor of Massachusetts for the said sum appropriated by Congress, which was of the tenor following: —

WAR SETTLEMENT WARRANT. No. 11343.

UNITED STATES TREASURY DEPARTMENT,
WASHINGTON, D. C., May 2, 1904.

To the Treasurer of the United States.

Pay to the Governor of the State of Massachusetts, or order, one million, six hundred eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85).

C. H. KEEP,
Assistant Secretary.
R. J. TRACEWELL,
Comptroller.
C. M. FOREE,
Chief Clerk.

The Assistant Treasurer, U. S., Boston, will pay this warrant. Certificate.

J. F. MELINE,
Assistant Treasurer.

No. 25639.

P. O. Address, Ce JOHN B. COTTON, *Agent and Atty.*, Washington, D. C.

3. Immediately after the issuance of said warrant the Treasury Department of the United States, without notice to the Commonwealth of Massachusetts that said warrant had been drawn or was ready for delivery, gave said warrant to said John B. Cotton, who, on the fourth day of May 1904, notified the Commonwealth of Massachusetts of such delivery. Thereupon the Governor of Massachusetts requested from said John B. Cotton the immediate transmission of said warrant to him, but said John B. Cotton refused to deliver said warrant to the Governor of Massachusetts until a sum equal to 10 per cent. of the amount of said warrant, namely, $161,174.09, should be paid to him by the Commonwealth of Massachusetts, and wrote to the Secretary of the Treasury, the Hon. Leslie M. Shaw, a letter in which, without color of right, he claimed a lien for said amount upon the sum which had been appropriated by Congress to the Commonwealth of Massachusetts. The correspondence concerning said matter is fully set forth hereinafter at pages 27–32, and is made a part hereof.

4. Thereupon, on the twenty-fourth day of June, 1904, the Governor of Massachusetts requested the Secretary of the Treasury to cancel said warrant No. 11343 which was in the possession of and withheld by said John B. Cotton, and to deliver to him a duplicate warrant for the sum of $1,611,740.85 appropriated by Congress as aforesaid, but the Secretary of the Treasury refused to issue a duplicate warrant. Thereupon, on the fifteenth day of July, 1904, the Governor of Massachusetts suggested for the consideration of the Honorable Secretary of the Treasury that the issuance of such duplicate warrant was the Commonwealth's legal right, and requested that he take the opinion of the Attorney-General of the United States thereon. Thereafter, on the eighteenth day of said July, the Secretary of the Treasury

requested the opinion of the Attorney-General, the Hon. William H. Moody, whether the practice of the Treasury Department of delivering treasury warrants to the attorneys of successful claimants against the United States, adopted, as he said, for the purpose of protecting such attorneys from clients who are impecunious or exempt from suit, was authorized by law.

Copies of the correspondence here referred to are set forth hereinafter on pages 9–11, as Exhibit A, 1 to 4, inclusive, and are made a part hereof.

5. The Attorney-General of the United States, on or about the eighteenth day of November, 1904, as your petitioner is informed and believes, advised the Secretary of the Treasury that the delivery of said warrant to said John B. Cotton was unauthorized, and that it was the Secretary's legal duty to issue to the Governor of Massachusetts a duplicate warrant for $1,611,740.85 in payment of the appropriation by Congress as aforesaid.

6. Immediately thereafter, on the eighteenth day of said November, the said John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity, No. 25032, in which Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts, are named as defendants, alleging that the Secretary is about to issue and deliver to the Governor of Massachusetts a duplicate warrant for said amount, claiming a lien upon the whole amount appropriated by Congress as aforesaid, for the payment to him of ten per cent. thereof, alleged to be due him under said agreement, and praying that the Secretary of the Treasury be enjoined from cancelling said warrant No. 11343, and issuing to John L. Bates or any other person a duplicate warrant in satisfaction of said appropriation by Congress to the Commonwealth of

Massachusetts, and that John L. Bates be enjoined from asking, demanding or receiving from said Leslie M. Shaw, or any of his assistants, subordinates or clerks, a duplicate warrant as aforesaid. A copy of said bill in equity, with its exhibits, is annexed hereto, marked Exhibit B, and made a part hereof.

7. The Supreme Court of the District of Columbia, under the laws and Constitution of the United States, has no jurisdiction in said cause to make any decree between said John B. Cotton and said Leslie M. Shaw, Secretary of the Treasury, concerning the payment of said appropriation by Congress in behalf of the Commonwealth of Massachusetts, since the rights of the Commonwealth of Massachusetts must necessarily be affected by such decree, and the Commonwealth of Massachusetts, by virtue of the Constitution of the United States, and particularly the Eleventh Amendment thereof, cannot become subject to the jurisdiction of said court. Yet the said court has nevertheless, in violation of the laws and Constitution of the United States, asserted and attempted to exercise jurisdiction in the premises by issuing on the eighteenth day of November last a rule to said Secretary of the Treasury and the Governor of Massachusetts commanding them to show cause why they should not be permanently enjoined according to the prayers of said bill and by retaining said suit for consideration, so that said suit is still pending in said court. No service upon the Governor of Massachusetts was made or attempted, and neither the Governor nor the Commonwealth of Massachusetts has appeared in said suit for any purpose. Upon the return day of said rule, hearing thereon was indefinitely postponed.

Whereby the Commonwealth of Massachusetts is continually injured and has no other adequate remedy than to

remove by mandate of this court the unlawful obstruction created by the unlawful assumption of jurisdiction by the respondents, which prevents the Secretary of the Treasury from fulfilling his legal duty in the premises as he is advised by the Attorney-General of the United States.

Wherefore, the Commonwealth of Massachusetts, the aid of this honorable court most respectfully requesting, prays remedy by writ of certiorari to be issued out of this honorable court to the Judges of the Supreme Court of the District of Columbia, to be directed, requiring them to return to this court a perfect record of all their proceedings in relation to said suit, and by writ of prohibition to said judges to prohibit them from holding the cause aforesaid further before them, and to prohibit them from taking any steps whatsoever in the cause aforesaid, and prohibiting them from making or entering any order, judgment or decree in said cause, and generally from the further exercise of jurisdiction in said cause or the enforcing of any order, judgment or decree made under cover thereof, and by writ of mandamus to said judges to command them to dismiss said suit.

THE COMMONWEALTH OF MASSACHUSETTS,

HERBERT PARKER,
Attorney-General,

FREDERICK H. NASH,
Assistant Attorney-General,
Of Counsel.

BOSTON, MASS., Dec. 17, 1904.

I do solemnly swear that I have read the annexed petition of the Commonwealth of Massachusetts and am familiar with the contents thereof, and that the facts therein stated are true, and that the facts therein stated on information and belief I verily believe to be true.

FREDERICK H. NASH.

Subscribed and sworn to before me, this seventeenth day of December, A.D. 1904.

LOUIS H. FREESE,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE SECRETARY, BOSTON, Dec. 15, 1904.

I hereby certify, that on the second day of April 1902, Louis H. Freese was appointed and commissioned, and on the third day of April, 1902, was duly qualified as a justice of the peace, for the said Commonwealth, for the term of seven years from the date of said commission: and that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of Court: that as such justice of the peace he is by law authorized to administer oaths, take depositions and acknowledgments of deeds and other instruments throughout the Commonwealth.

In testimony of which, I have hereunto affixed the great seal of the Commonwealth, on the day of the date first above written.

(Seal of the Commonwealth.)

WM. M. OLIN,
Secretary of the Commonwealth.

EXHIBIT A–1.

EXECUTIVE DEPARTMENT, BOSTON, June 24, 1904.

Hon. L. M. SHAW, *Secretary of the Treasury, Washington, D. C.*

SIR: — Having been advised that, pursuant to an appropriation of Congress in the deficiency act of April 27, 1904, war warrant No. 11343, dated May 2, 1904, was drawn on the treasury of the United States and made payable to the Governor of the State of Massachusetts, or his order, for the sum of $1,611,740.85, I have the honor to inform you that such warrant has never been received by the Governor of this Commonwealth. I am further advised that such warrant was delivered by the Treasury Department of the United States to John B. Cotton, Esq., of Washington, representing himself to be the agent and attorney of this Commonwealth. Mr. Cotton informs me also that the warrant is in his possession, and that he declines to make delivery of the same to me, or to the accredited officers of this Commonwealth, until a claim which he asserts shall have been met or satisfied. I do not now discuss or consider the merit or right of such claim, for I do not deem it of significance as affecting or staying the right of this Commonwealth to payment by the federal government of the amount appropriated by Congress.

I have the honor, therefore, to request that payment upon the warrant already drawn be stopped, that the warrant itself be cancelled, and that you will forward to me, as Governor of this Commonwealth, a duplicate thereof.

I have the honor to be,

Yours respectfully,

JOHN L. BATES.

EXHIBIT A–2.

TREASURY DEPARTMENT, WASHINGTON, July 2, 1904.

MY DEAR SIR: — I have gone over the matter referred to in your letter of June 14, and do not see my way clear to grant your request. Mr. Cotton has filed with the Department an agreement

regular in form and which appears to be genuine. In the preamble of the agreement it is recited that the Commonwealth of Massachusetts "is about to present to the Treasury Department its claim," etc. In the agreement Mr. Cotton is made "its agent and attorney to present, prosecute and recover the claim." As a matter of fact, Mr. Cotton did present the claim and did recover the warrant. The warrant is payable to the Governor of Massachusetts and can only be paid on his endorsement.

The situation then appears to be as follows: the agent of the Commonwealth of Massachusetts holds in his possession a warrant payable only on the Governor's endorsement, which he now refuses to surrender. Being authorized to recover, the delivery of the warrant to the regularly constituted agent of the Commonwealth appears to be regular and fully authorized. Being thus regular and authorized, and the warrant unlost, as I am now advised, I see no excuse or justification for issuing a duplicate. If I am in error in my analysis I shall be very glad to hear from you.

Very truly yours,

L. M. Shaw.

Hon. John L. Bates, Boston, Mass

Exhibit A–3.

Executive Department, Boston, July 15, 1904.

Hon Leslie M. Shaw, *Secretary of the Treasury, Washington, D. C.*

Sir: — An enforced absence has delayed a more immediate reply to your letter of July 2 in reply to my letter of the 14th of June. From intimations contained in your letter, I am led to believe that some essential propositions involved in my request have not been fully presented for your consideration. I am advised that the issuance of the warrant, in accordance with my request, is a matter of right and of law. If upon full consideration you are in doubt as to acceding to the request, I venture to hope that you will have the kindness to refer the matter to the Attorney-General, before whom, if he so desires, the position of the Commonwealth in this regard will be fully set forth.

Yours respectfully,

John L. Bates.

EXHIBIT A–4.

TREASURY DEPARTMENT, WASHINGTON, July 18, 1904.

MY DEAR SIR: — On the eighteenth day of July, 1899, the Commonwealth of Massachusetts, through its Chief Executive, Hon. Roger Wolcott, made a contract with Mr. John B. Cotton for the prosecution and collection of a certain claim against the United States, growing out of expenditures at the time of the civil war. I enclose you herewith a copy of the contract, which was duly filed with this Department. Subsequently the claim was adjusted, an appropriation by Congress made, and a warrant issued. It has been the custom of the Department for many years to make all warrants payable to the claimants, and deliver them to the regularly authorized attorneys for the claimants. In this way the Department protects both the claimants and the attorneys. Private claimants against the Government are frequently impecunious, and others are exempt by law from civil suits, and if the Department were to deliver the warrants direct to the claimants, the attorneys would be remediless. Accordingly, a warrant for $1,611,740.85 was drawn, payable to the Governor of Massachusetts, and delivered to John B. Cotton.

The question I desire to ask is whether the practice is authorized, and, particularly, whether in the instance of the Commonwealth of Massachusetts the delivery of the warrant to Mr. John B. Cotton was authorized under the contract. In other words, was the delivery to Mr. Cotton of the warrant, payable to the order of the Governor of the Commonwealth, a good and legal delivery?

Very truly yours,

L. M. SHAW.

The Honorable the Attorney-General.

Exhibit B.

[Filed Nov. 18, 1904. J. R. Young, *Clerk*.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The day of August, A.D. 1904.

In Equity, No. 25032.
Doc. 56.

John B. Cotton, *Complainant*,

v.

Leslie M. Shaw, *Secretary of the Treasury*, and John L. Bates, *Governor of the Commonwealth of Massachusetts*.

To the Supreme Court of the District of Columbia, holding an Equity Court.

The complainant states as follows: —

1. Your complainant, John B. Cotton, is a citizen and resident of the District of Columbia, and brings this suit in his own right for and because of the matters and things hereinafter set forth.

2. The defendant, Leslie M. Shaw, is a citizen of Iowa now residing in the District of Columbia, and is the Secretary of the Treasury of the United States, and is sued herein for and on account of certain acts which he threatens to perform in his official capacity as such Secretary of the Treasury, but for which threatened acts there is no authority or warrant in law.

The defendant, John L. Bates, is a citizen of the Commonwealth of Massachusetts, a resident of said Commonwealth and is the Governor thereof, and is sued herein because of the matters and things hereinafter set forth.

3. Your complainant is an attorney at law by education, profession and practice, having been admitted to the bar of the Supreme Judicial Court of the State of Maine in the year 1866 and continued thereafter in active practice of such profession in and before the courts of that State until some time in the year 1869, when he was nominated by the President of the United States as an Assistant Attorney-General of the United States, and such nomination having been confirmed by the Senate of the United States, complainant in said year came to the city of Washington in the District of Columbia and as such Assistant Attorney-General was assigned to and assumed charge of the business of the United States pending before the Court of Claims and on appeal therefrom to the Supreme Court of the United States, and continued to discharge the duties of his said office until some time in the year 1893, when he resigned his said office and entered upon the general practice of the law in the District of Columbia, having prior to said date been duly admitted to practice before the various courts of law sitting in said District and the various departments of the government located therein, and has continued in such general practice until the present time.

4. By an act of the Congress of the United States approved July 27, 1861 (12 Stats. L. 276), it was provided: —

> That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the treasury not otherwise appropriated, to pay to the Governor of any State or to his duly authorized agents the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the treasury.

and the intent and meaning of said act was by a subsequent resolution of Congress, approved March 8, 1862 (12 Stats. L. 615), declared to be as follows: —

> That the said act shall be construed to apply to expenses incurred as well after as before the date of the approval thereof.

5. The Commonwealth of Massachusetts having properly incurred certain costs, charges and expenses in enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops engaged in aiding to suppress the insurrection against the United States between the years 1861 and 1865, and having a claim therefore against the United States under the statutes aforesaid, which claim had not been paid and was not even in course of adjustment, the proper officers of said Commonwealth in or about the year 1899 considered at length the propriety of employing counsel to press such claim against the United States for payment, said officers having full power and authority to make such employment and to contract with the person so employed as to the amount of his compensation and the manner of his payment. And thereafter the Hon. Hosea M. Knowlton, then Attorney-General of said Commonwealth, having first come to the city of Washington and advised himself fully in the premises on the fourth day of March, A.D. 1899, wrote to the Hon. Roger Wolcott, then Governor of said Commonwealth, in reference to said claim as follows: —

> . . . I recommend that this office be instructed to see what arrangements can be made with Mr. Cotton for the conduct of the claim of the Commonwealth before the Court of Claims in Washington.

The "Mr. Cotton" referred to in said letter being your complainant.

And thereafter, in pursuance of such recommendation, on the twelfth day of July, 1899, Hon. E. F. Hamlin, Executive Secretary of the Legislative Council of the Commonwealth, wrote to said Attorney-General Knowlton as follows: —

COMMONWEALTH OF MASSACHUSETTS,
COUNCIL CHAMBER, BOSTON, July 12, 1899.

Hon. H. M. KNOWLTON, *Attorney-General, State House, Boston.*

DEAR SIR: — I have the honor to inform you that at a meeting of the Executive Council held this day it was voted that the Attorney-General be authorized to employ Mr. John B. Cotton of Washington to represent the Commonwealth in the prosecution of certain claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The compensation for such employment not to exceed 10 per cent. of the amount collected.

Very truly yours,

E. F. HAMLIN,
Executive Secretary.

The minutes of the meeting of said Legislative Council, held on said twelfth day of July, 1899, contains the following: —

It was voted that the Attorney-General be authorized to employ John B. Cotton of Washington, D. C., to represent this Commonwealth in the prosecution of certain claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The compensation for such employment not to exceed 10 per cent. of the amount collected.

Thereafter, on the fifteenth day of July, A.D. 1899, said Attorney-General Knowlton wrote to your complainant as follows: —

COMMONWEALTH OF MASSACHUSETTS.
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, July 15, 1899.

JOHN B. COTTON, Esq., *Washington, D. C.*

DEAR SIR: —I am directed by the Governor and Council to say that I am authorized to enter into a contract with you in behalf of the Commonwealth for the collection of claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion, for 10 per cent. of the amount collected; the same to be in full of all charges.

As I remember, the enclosed form of contract is sufficient in form. If you agree to the terms, and will insert the amount specified and execute it on your part, in duplicate, I will have similar execution made by the Governor in behalf of the Commonwealth.

Yours very truly,

(Signed) HOSEA M. KNOWLTON,
Attorney-General.

And the form of contract referred to in said letter as enclosed therewith being in all respects satisfactory to your complainant, it was executed in duplicate by him without change, alteration or addition other than to fill in with the date of execution and the amount of compensation, as specified in said resolution of the Council, the blanks left therein for such purpose, and immediately thereafter said duplicate copies of said proposed contract were returned by this complainant to said Attorney-General Knowlton for the further execution by Governor Wolcott on behalf of the Commonwealth.

6. Thereafter, said duplicate copies of said proposed contract so executed by your complainant having been received by said the Attorney-General of the Commonwealth he forwarded the same to Governor Wolcott with the following communication: —

JULY 19, 1899.

To His Excellency ROGER WOLCOTT, *Governor.*

DEAR SIR: — In obedience to the instructions of the Executive Council, embodied in the vote of that honorable body passed at a meeting held on July 12, I have prepared a form of contract in duplicate between the Commonwealth and John B. Cotton, authorizing him to prosecute the claim of the Commonwealth of Massachusetts for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The duplicates have been duly signed by Mr. Cotton and returned to me.

I have the honor to enclose them herewith for execution by Your Excellency in behalf of the Commonwealth. When so executed, and the seal of the Commonwealth affixed, one copy should be sent to Mr. Cotton and the other retained among the archives of the Commonwealth.

Yours very truly,

HOSEA M. KNOWLTON,
Attorney-General.

And the same having been duly executed by said Governor Wolcott, under his hand and the official seal of the Commonwealth, one copy thereof was placed in the archives of the Commonwealth, where it still remains, and the duplicate original thereof was delivered to your complainant and subsequently filed by him in the treasury of the United States as evidence of his right and authority to appear before that Department in the prosecution of said claim and to recover for and in behalf of the Commonwealth the amount found to be due to it on account thereof.

The said contract, which was also the power of attorney of your complainant, is still in full force and effect, never having been revoked or otherwise annulled, and is in the words and figures following, to wit: —

Memorandum of an agreement and appointment made this eighteenth day of July, A.D. 1899, by and between the Commonwealth of Massachusetts by Roger Wolcott, its Governor, on the one part, and John B. Cotton of Washington, District of Columbia, on the other part:

Witnesseth, *whereas*, said Commonwealth of Massachusetts has a claim against the United States for "costs, charges and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops engaged in aiding to suppress the insurrection against the United States" between the years 1861 and 1865, both inclusive, under and by virtue of an act entitled "An Act to indemnify the States for expenses incurred by them in defence of the United States," approved July 27, 1861, and the resolution approved March 8, 1862, declaratory of the intent and meaning of the act aforesaid; and

Whereas, said Commonwealth of Massachusetts is about to present to the Treasury Department of the United States its claim aforesaid:

Now, *therefore*, said Roger Wolcott, Governor of the Commonwealth of Massachusetts, for and in consideration that said John B. Cotton has agreed to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States said claim of the Commonwealth of Massachusetts, has appointed and does hereby appoint said John B. Cotton its agent and attorney to present, prosecute and recover the claims as aforesaid on the terms and conditions hereinafter specified.

Said John B. Cotton agrees to prepare, present, prosecute and endeavor to recover before said Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States the claim aforesaid on behalf of said Commonwealth of Massachusetts at a compensation of 10 per centum of the entire sum collected, payable only out of any sums that may be collected hereunder, and without any liability on behalf of said Commonwealth of Massachusetts for expenses incurred by said Cotton in the prosecu-

tion of said claim in bringing of petitions, taking depositions, employing of expert accountants, printing of records and briefs, fees of commissioners, costs of court or of any other expense of any kind or nature whatsoever, excepting only the clerical assistance hereinafter specified, and said John B. Cotton does further agree to make and present to the Governor of the Commonwealth of Massachusetts or the Attorney-General or any other officer of said Commonwealth designated by the Governor, at the end of each six months, or oftener if thereto requested, a full report concerning the status and condition of said claim.

It is further understood and agreed that said John B. Cotton shall give prompt attention to the prosecution of said claim and that he shall be furnished by the proper department of the Commonwealth of Massachusetts facilities and clerical assistance of department clerks for the examination of the books and records of said Commonwealth in relation to said claim, necessary and proper for making up, presentation and prosecution thereof.

In witness whereof, said Roger Wolcott, Governor of said Commonwealth, and in behalf thereof, has hereunto set his hand, and caused the seal of said Commonwealth to be hereto affixed, and said John B. Cotton has hereunto set his hand and seal the day and year first above written.

Signed and sealed in duplicate in presence of

ROGER WOLCOTT,
Governor of the Commonwealth of Massachusetts
JOHN B. COTTON.

(Seal of the Commonwealth of Massachusetts.)

7. Thereafter, that is to say immediately upon receipt of said duplicate copy of said power of attorney and contract duly executed by the Commonwealth of Massachusetts and this complainant as aforesaid, your complainant entered upon the performance of his duties as attorney and agent thereunder, and did continuously and unremittingly thereafter render services in such connection, both before the Secretary of the Treasury, the Auditor and the Comptroller of the

Treasury and the United States Court of Claims, and elsewhere, and to such effect that on or about the second day of May, A.D. 1904, there was issued by the United States Treasury Department a warrant in favor of the Governor of the State of Massachusetts for the sum of $1,611,740.85, which said warrant, being in words and figures following: —

WAR SETTLEMENT WARRANT. No. 11343.

UNITED STATES TREASURY DEPARTMENT,
WASHINGTON, D. C., May 2, 1904.

To the Treasurer of the United States.

Pay to the Governor of the State of Massachusetts, or order, one million, six hundred eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85).

C. H. KEEP,
Assistant Secretary.
R. J. TRACEWELL,
Comptroller.
C. M. FOREE,
Chief Clerk.

The Assistant Treasurer, U. S., Boston, will pay this warrant.

J. F. MELINE,
Assistant Treasurer.

No. 25639.

P. O. Address, Ce JOHN B. COTTON, *Agent and Atty.*, Washington, D. C.

was, under the authority of his said power of attorney and contract, and in accordance with the long-established custom of the Treasury Department, delivered to your complainant as the duly recognized and acting attorney of said Commonwealth.

8. During the progress of the prosecution of said claim before said Court of Claims and the United States Treasury

Department and elsewhere, your complainant at all times kept the Attorney-General of the Commonwealth of Massachusetts and the Governor thereof fully informed as to his acts and doings thereabouts, and at no time was any dissatisfaction expressed by such officers with any of his said acts and doings, but on the contrary many words in commendation of his labors and the result being effected thereby were written and spoken to your orator not only by Governor Wolcott and Attorney-General Knowlton, by whom said contract and power of attorney was executed, but also by their successors in office, including the Hon. John L. Bates, the present Governor of the Commonwealth, and the Hon. Herbert Parker, the present Attorney-General thereof, and at no time by any of such officers was any dissatisfaction expressed with said contract or the labors of your complainant thereunder until subsequent to the making of the appropriation by the Congress in the above amount to satisfy this claim, and the warrant in question was about to be issued therefor, when the said Herbert Parker, Attorney-General as aforesaid, intimated to your complainant that in his view the compensation agreed to be paid under and by the contract aforesaid was much too large, and suggested that the matter of the amount to be paid to your complainant in the premises, notwithstanding the solemn compact of the State in the premises made before the services were rendered by this complainant, should be submitted to arbitrators for ascertainment and determination, which suggestion your complainant declined to consider or adopt.

9. Thereafter, on the fourth day of May, A.D. 1904, your complainant over his firm name and signature of "Cotton & White" notified the Hon. Herbert Parker, Attorney-General as aforesaid, by letter, that the warrant in question had been delivered to him by the Treasury Department "under the

authority of the contract between the Commonwealth of Massachusetts" and himself, and thereafter, on the sixth day of May, 1904, said Attorney-General, in writing, acknowledged the receipt of said notification and said: —

I have advised His Excellency the Governor of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him.

Thereafter, this complainant on the twelfth day of May, 1904, replied to said Attorney-General, by letter, saying therein among other things that —

The warrant in question was transmitted to me by the Department of the Treasury as the agent and attorney of the Commonwealth of Massachusetts. Such is the usual custom of the Department and has been so in respect to all the State cases. . . . Under the law I was [am] entitled to a lien upon the warrant for the amount of my fees, as by the contract, and to retain the warrant until such fees are paid me, which [act] I had a right to assume would be simultaneous with the delivery of the warrant to the Governor. As I have received intimations that you do not consider me entitled to receive my pay in full, under my contract, and as I entertain no doubt as to my rights under the same, I feel amply justified in asserting my lien. For these reasons I must respectfully decline to deliver the warrant until the fees are paid. —

and on the same day forwarded by mail a copy of said letter direct to the Hon. John L. Bates, Governor of said Commonwealth.

On the fourteenth day of May, A.D. 1904, your complainant, in writing, notified the Hon. Leslie M. Shaw, Secretary of the Treasury, that he claimed

a lien for compensation upon the sum mentioned in said warrant, and also upon the warrant itself, in accordance with my [his] contract and the law in relation thereto.

On the sixteenth day of May, A.D. 1904, said Attorney-General Parker, acknowledging receipt of your complainant's said letter of May 12, said among other things: —

As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has caused me much anxiety, and upon which issue I have entertained grave doubts. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not yet brought me to that conclusion, though my investigation is not fully complete.

I do not venture at this moment to express any opinion as to your lien upon the warrant payable to the Governor of this Commonwealth. Whether you have such right or not, I much regret you have felt that the protection of your rights required its assertion.

On the twenty-eighth day of May, A.D. 1904, your complainant addressed and mailed a further communication to said Governor Bates, wherein, after reviewing the correspondence hereinbefore referred to, the following language appears: —

That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so.

The letter of May 16 from the Attorney-General led me to expect, and I think with good reason, that I would be notified at a reasonably early date as to the conclusion to which Your Excellency and he had come in regard to the validity of my agreement with the

Commonwealth. I have waited patiently for this decision, but as yet have not received it.

Apart from all considerations as to my legal right to have you say whether the Commonwealth does or does not regard my agreement as a valid one (and I think I have a legal right to know whether you recognize it or not), it seems to me clear that, in view of my long and arduous service in behalf of the Commonwealth in the matter, the pleasant relations which have always existed between us, and the frequent and very gratifying commendations of my work which I have received both from the executive and the legal departments of the Commonwealth, I am entitled to this much of consideration on your part as an act of simple justice.

A determination of this main question on your part would also, even if adverse to me, relieve the situation of many of its present unpleasant features, and leave both parties to take such legal action as they may be advised.

I respectfully ask Your Excellency, therefore, to inform me at your early convenience whether the validity of my claim to compensation at the rate of 10 per cent. is acknowledged or denied by the Commonwealth.

And also on the same date mailed a copy of said communication to the Hon. Attorney-General Parker for his information, the receipt of said copy being acknowledged by said Attorney-General under date of May 31, 1904, all of which, together with the reply of your complainant to said last-mentioned letter, will fully and at large appear upon inspection of the true copies of all of said letters hereto attached marked Exhibits A, 1 to 10 inclusive, all of which are hereby made part and parcel of this bill of complaint and prayed to be read therewith as though they had been set forth fully and at large herein.

10. Since the date of said last-mentioned letter marked Exhibit A–10, as aforesaid, same being dated June 6, 1904, neither said Governor Bates nor said Attorney-General

Parker have communicated further with your complainant on the said subject, but your complainant has been informed by the defendant, Leslie M. Shaw, Secretary of the Treasury, as aforesaid, that since said date, to wit, on the day of July, A.D. 1904, said Governor Bates had requested him to cancel the warrant heretofore issued in favor of the said Governor of the State of Massachusetts and delivered to your complainant as aforesaid, and to have prepared and issued direct to said Governor a second warrant for the total amount of the $1,611,740.85; and notwithstanding your complainant's objections in the premises and his rights as attorney to be protected to the extent of the amount of fees solemnly and distinctly contracted to be paid to him, said defendant, Leslie M. Shaw, in his official capacity of Secretary of the Treasury, without any warrant or authority in law for so doing, threatens to cancel on the books of the Treasury Department the warrant hereinbefore particularly set forth and described, being War Settlement Warrant No. 11343, dated May 2, 1904, and also to cancel all entries and notations concerning the signing and issuance thereof; and further threatens to have prepared, signed and issued a duplicate or second warrant of like tenor and effect, and to issue and deliver the same direct to the said defendant John L. Bates, Governor as aforesaid, the sole object and purpose of so doing being to defeat this complainant's right of lien and to delay and possibly defeat entirely the payment to him of the compensation by the contract hereinbefore set forth agreed to be paid to him, said contract having been fully executed and performed upon your complainant's part.

Wherefore, inasmuch as complainant is entitled in law to his attorney's lien upon the papers of his client now in his possession, including among such papers the warrant in question, and is also entitled by the same law to have said

lien and the results which would naturally and usually flow from the possession and assertion thereof duly protected, and as in such regard he is otherwise remediless and without redress, inasmuch as neither of said defendants nor both together, so far as complainant is advised or believes, are or would be personally able to respond in damages in any amount at all approximating the amount of the fees agreed to be paid to him under his said contract and for the payment of which he is lawfully entitled to assert and maintain his attorney's lien upon the warrant aforesaid, complainant prays: —

(1.) That writs of subpœna may be issued and served upon the defendants who are, 1, Leslie M. Shaw, Secretary of the Treasury, 2, John L. Bates, Governor of the Commonwealth of Massachusetts.

(2.) That said defendant, Leslie M. Shaw, and his assistants, subordinates and clerks, may be restrained and enjoined *pendente lite*, and after hearing, permanently, from cancelling or attempting to cancel upon the books of the Treasury Department or otherwise the Treasury Warrant heretofore issued in favor of the Governor of the State of Massachusetts and now in the possession of complainant, the same being War Settlement Warrant No. 11343, dated May 2, 1904, and drawn on the Treasurer of the United States in favor of the Governor of the State of Massachusetts, for the sum of $1,611,740.85; and that said defendant, Leslie M. Shaw, his assistants, subordinates and clerks, may also be restrained and enjoined *pendente lite* and after hearing, permanently, from drawing, making, signing or issuing to said defendant, John L. Bates, or any other person, a second or duplicate warrant in settlement or satisfaction of the claim of the State of Massachusetts, in this bill of complaint set forth, or in lieu or place of the said described warrant now outstanding and in possession of complainant as aforesaid.

(3.) That the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid.

(4.) And for such other and further relief as to, the premises considered, this honorable court may seem to be right and proper in the premises.

And complainant will ever pray, etc.

JOHN B. COTTON.

FREDERICK D. MCKENNEY,
Solicitor for Complainant.

WM. FRYE WHITE,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, ss.

I, John B. Cotton, being first duly sworn, do solemnly swear that I have read the bill of complaint by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN B. COTTON.

Subscribed and sworn to before me this ninth day of August, A.D. 1904.

(Notarial Seal.)

JAMES MALCOLM HENRY,
Notary Public, D. C.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–1.

MAY 4, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

SIR: — We have the honor to advise you that under the authority of the contract between the Commonwealth of Massachusetts and our Mr. Cotton, and following the custom of the Treasury Department, that Department has delivered to our Mr. Cotton treasury warrant

payable to the Governor of the Commonwealth of Massachusetts for $1,611,740.85, which is the amount appropriated by Congress to reimburse the Commonwealth for expenditures, etc., under the act of Congress of July 27, 1861.

We are yours very respectfully,

COTTON & WHITE.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–2.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, May 6, 1904.

Messrs. COTTON & WHITE, *Sun Building, Washington, D. C.*

GENTLEMEN: — I have received your communication of May 4, 1904, in which you state that under the authority of the contract between the Commonwealth of Massachusetts and your Mr. Cotton, and following the custom of the Treasury Department, that Department has delivered to your Mr. Cotton treasury warrant, payable to the Governor of the Commonwealth of Massachusetts, for $1,611,740.85. I have advised His Excellency the Governor of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him.

Respectfully yours,

HERBERT PARKER,
Attorney-General

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–3.

MAY 12, 1904.

Hon. HERBERT PARKER, ATTORNEY-GENERAL, *Boston, Mass.*

DEAR SIR: — I take my very first opportunity, on my arrival home, to answer your letter of May 8, 1904, replying to that of Cotton & White of May 4, 1904. You say: "I have advised His Excellency the Governor of the receipt of your communication and I am requested by him to say to you that he awaits the immediate transmission of the warrant to him."

The warrant in question was transmitted to me by the Department of the Treasury as the agent and attorney of the Commonwealth of

Massachusetts. Such is the usual custom of the Department and has been so in respect to all the State cases. According to the rules of the Department I filed with it my duplicate original of the contract entered into between the Commonwealth and myself, appointing me its agent and attorney to prosecute the claim of the Commonwealth against the United States. Under the law I was entitled to a lien upon the warrant for the amount of my fees, as by the contract, and to retain the warrant until such fees are paid me, which act I had a right to assume would be simultaneous with the delivery of the warrant to the Governor. As I have received intimations that you do not consider me entitled to receive my pay in full, under my contract, and as I entertain no doubt as to my rights under the same, I feel amply justified in asserting my lien.

For these reasons I must respectfully decline to deliver the warrant until the fees are paid.

I desire to assure you, both personally and in your capacity of Attorney-General, that I much regret the condition which, without fault on my part, has obliged me to come to the above conclusion.

For nearly five years I have diligently and faithfully striven to advance the interests of the Commonwealth in the collection of this claim. My work was done under a contract with the Commonwealth which at the time of its making, as well as now, I have every reason to believe was lawful. The contract was made under the supervision of a learned lawyer, Mr. Attorney-General Knowlton, after a careful consideration of the whole subject-matter, and on official advice by him to Governor Wolcott.

This is not the occasion to enter into a discussion of the circumstances attending the inception and making of the contract, or of my labors under it. If you have ever entertained any doubts respecting the technicalities involved in the making of the contract, I trust that your further examinations have solved them in favor of its legality and the justice of the payment to me of my fees. The records of your Department during the incumbency of Mr. Attorney-General Knowlton, and since your accession to the office, show the faithfulness with which I have performed the duties under my contract, and I have received from time to time your own personal testimonials as to the value of my work.

Referring to the equities of the contract, I think you will not disagree with me as to the fairness of the per cent. to which I am entitled. Whilst it is true that the case demanded a large amount of clerical work, the legal questions involved, being without precedent, and ranging through constitutional law and other topics, have been arduous, and required the greatest care.

I therefore beg leave to suggest what other States have done in respect to fees in like cases which seems to me to be strongly persuasive. The State of Maine contracted to pay, and did pay, 20 per centum of the amount recovered; New Hampshire paid 15 per centum; Vermont contracted to pay 25 per centum, not exceeding $40,000, and the amount recovered was, in round numbers, $280,000. The State of Kentucky paid 10 per centum on $900,000, and Pennsylvania paid 10 per centum on $1,500,000, in round numbers.

I know that it is your wish to do what is right about the matter, and that you will accord to me the same consideration. I want the Commonwealth as speedily as possible to have the benefit of this money.

I know that by not making this claim as early as 1878, when the last of the Commonwealth's bonds were paid, reckoning at 6 per cent. on the amount of the appropriation, your State has lost nearly two million of dollars. I feel that I have a right to claim some credit upon the finding of a way to legally obtain a determination of the Commonwealth's right, which had slumbered all this time, and was barred by the statute of limitations in the only court which could give judgment in its favor. I fully believe your State is entitled to a very much larger sum than she gets, and that the award should have been, under the claim filed by me, nearly a million and a half dollars greater than she will receive.

I sincerely trust that His Excellency the Governor will find it compatible, both with law and justice, to pay my fees upon the basis of the contract, and release to the State the money which she long since ought to have received.

I have the honor to be,

Yours very respectfully,

JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. Young, *Clerk.*]

Exhibit A–4.

May 12, 1904.

To His Excellency the Governor.

My Dear Sir: — I enclose herewith a statement of my reasons for declining to forward to you the warrant for the late appropriation to the Commonwealth of Massachusetts from the United States, made as the result of my contract of July, 1899. I have communicated the original to Hon. Herbert Parker, Attorney-General of the Commonwealth, for the reason that the request for the transmission of the warrant was made by you through him.

I could not do justice to myself, however, without addressing a brief statement personally to you. In so doing I refer to the enclosed, not as an exhaustive statement of the history of the matter and of my views in relation to the same, but as giving you a general outline of such views. As the Chief Executive of the Commonwealth you are entitled to them, and I give them also because of the pleasant relations which have existed between yourself and myself and my friends in relation to this case.

I have practised law between thirty-eight and forty years, both in federal and State courts, and in an honored position in the office of the Attorney-General of the United States, and I have never had occasion to seriously disagree with those for whom I have acted, and I know you will believe me when I say that the present condition is one exceedingly unpleasant to me.

I can assure you that during the long time I have been acting for the Commonwealth I have endeavored to faithfully perform my duties for her best interests. I have given the matters involved the closest attention possible. I have spared neither time nor legitimate expense.

I am not satisfied with the result of the audit of your claim. I honestly believe it to be less by a million and a half of dollars than it should be. The result, however, is a common one in the prosecution of claims against the United States, in which many honest creditors have been denied their just dues.

It will be gratifying to me when your State shall obtain the sum allowed, for such uses as your Legislature in its wisdom shall desire to vote to it.

I have the honor to be,

Yours respectfully,

JOHN B. COTTON.

Hon. JOHN L BATES, Boston, Mass.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–5.

MAY 14, 1904.

To the Secretary of the Treasury.

SIR: — Referring to the appropriation by Congress of the sum of $1,611,740.85, in behalf of the Commonwealth of Massachusetts for reimbursement under the act of July 27, 1861, and for which said amount you have issued a warrant of the Department of the Treasury, directing the same to the Governor of the Commonwealth of Massachusetts, in my care as agent and attorney of said Commonwealth, and which is now in my possession, in accordance with the contract between the Commonwealth and myself a duplicate original of which is filed in your Department, I beg leave to say that whilst I trust there is no necessity for this notification, yet, out of abundant caution, I desire to notify you that I claim a lien for compensation upon the sum mentioned in said warrant, and also upon the warrant itself, in accordance with my contract and the law in relation thereto.

I am yours very respectfully,

JOHN B. COTTON.

Hon LESLIE M. SHAW, Washington, D. C.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–6.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, May 16, 1904.

JOHN B. COTTON, Esq, *Sun Building, Washington, D. C.*

DEAR SIR: — I beg to acknowledge yours of May 12. As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has

caused me much anxiety, and upon which issue I have entertained grave doubts. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not yet brought me to that conclusion, though my investigation is not fully complete.

I do not venture at this moment to express any opinion as to your lien upon the warrant payable to the Governor of this Commonwealth. Whether you have such right or not, I much regret that you have felt that the protection of your rights required its assertion. Your frank statement of your claim complicates the situation for the moment, and may add still further complications, but of course you anticipated such results and have prepared yourself for them. I assume that the Governor and Council will immediately determine upon such course of action as may be concluded to be required and justified, and you will be seasonably advised of their decision.

I should be glad of an opportunity to confer again either with you or with your counsel, if you have such, for, as I have stated to you, I have no wish to raise any issue except such as seems to be imperatively demanded by official duty.

I am yours very truly,

(Signed) HERBERT PARKER,
Attorney-General.

[Filed November 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–7.

WASHINGTON, D. C., May 28, 1904.

To His Excellency JOHN L. BATES, *Governor.*

DEAR SIR: — On May 4 I notified Attorney-General Parker that I had received the warrant to the Commonwealth of Massachusetts from the United States, for the appropriation made as the result of my service in behalf of the Commonwealth as its agent and attorney in the prosecution of war claims pursuant to my contract of July, 1899.

On May 6 the Attorney-General replied to me, saying in substance that he had advised Your Excellency of the receipt of my

communication, and had been requested by you to say in reply that you awaited "the immediate transmission" of the warrant to you.

Under date of May 12 I wrote both to Your Excellency and to the Attorney-General at some length, saying, in substance, that under my contract with the Commonwealth, as well as by the general provisions of the law applicable to such matters, I am entitled to a lien upon the warrant for the amount of my fees, and that, in view of the apparent unwillingness of the Commonwealth, as represented by Your Excellency and by the Attorney-General, to recognize the validity of my claim to ten per cent. of the amount collected, as agreed upon, I felt bound, in justice to myself, to assert this lien. At the same time I expressed my entire willingness, and indeed my earnest desire, to turn over the warrant to you simultaneously with the payment of my fees.

In his reply under date of May 16 the Attorney-General said: "As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has caused me much anxiety, and upon which issue I have entertained grave doubt. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not brought me to that conclusion, though my investigation is not fully complete. . . . I assume that the Governor and Council will immediately determine upon such course of action as may be concluded to be required and justified, and you will be seasonably advised of their decision."

Since that time I have been informed by friends of mine who had an interview with the Attorney-General about the matter that he was inclined to question my right to a lien upon the warrant, and to think that I was bound to deliver the warrant to you, irrespective of my right to my fees and while you still refuse to recognize such right. But I have received no intimation whatever as to whether the Attorney-General has completed his investigation, or as to the conclusion to which he may have come upon the main and I hope the only real issue between us.

I cannot assent to the proposition that I have no lien upon the

sum collected. It is true that by the terms of the written contract of July, 1899, my compensation is payable out of the sum collected for the Commonwealth, but, as I understand the law, the effect of a provision of this kind is to give a lien and not to destroy it.

Assuming that a lien exists in cases where compensation is payable out of the sum collected, it is, of course, apparent that where both parties elect to stand upon their strict legal rights, their several interests are fully protected only by simultaneous action, the payment of fees being contemporaneous with the delivery of the amount collected.

That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so.

The letter of May 16 from the Attorney-General led me to expect, and I think with good reason, that I would be notified at a reasonably early date as to the conclusion to which Your Excellency and he had come in regard to the validity of my agreement with the Commonwealth. I have waited patiently for this decision, but as yet have not received it.

Apart from all considerations as to my legal right to have you say whether the Commonwealth does or does not regard my agreement as a valid one (and I think I have a legal right to know whether you recognize it or not), it seems clear to me that, in view of my long and arduous service in behalf of the Commonwealth in the matter, the pleasant relations which have always existed between us, and the frequent and very gratifying commendations of my work which I have received both from the executive and the legal departments of the Commonwealth, I am entitled to this much of consideration on your part as an act of simple justice.

A determination of this main question on your part would also,

even if adverse to me, relieve the situation of many of its present unpleasant features, and leave both parties to take such legal action as they may be advised.

I respectfully ask Your Excellency, therefore, to inform me at your early convenience whether the validity of my claim to compensation at the rate of 10 per cent. is acknowledged or denied by the Commonwealth.

Yours very respectfully,
(Signed) JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–8.

MAY 28, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

MY DEAR MR. PARKER: — Enclosed you will find copy of a communication under this date to His Excellency John L. Bates, in relation to the matter of my compensation from the Commonwealth, for services in the matter of the collection from the United States for the interest on the war loan. I trust the communication will clearly inform you of my view of the present status of the matter. I further hope that you have been able by this time to come to a decision upon the matters of which you have stated to me you had doubts. I desire to say to you in addition that I am very anxious that this whole matter, the present condition of which I deplore, will soon be satisfactorily settled.

I am very truly yours,
JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–9.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY GENERAL, BOSTON, May 31, 1904.

JOHN. B. COTTON, Esq., *Washington, D. C.*

MY DEAR MR. COTTON: — I have yours of May 28 enclosing copy of a communication to His Excellency the Governor, in the matter of your claim for compensation upon the prosecution of the

demand against the federal government. I have already, both by letter and in conversation, stated to you my view of the status of your claim and of the grave doubt I have as to the validity of the contract. I hoped that the presentation of your views as to the law, and those urged upon me by gentlemen representing you, would relieve me of the serious doubt which still impresses me.

No refusal on the part of the Commonwealth to pay your claim has ever been made, nor had you ever set forth the details of your claim in any demand. I wrote you that I much regretted your refusal to respond to the executive demand to deliver the warrant to the Governor, whose property it is, as representing the Commonwealth: and until it shall have been received by him, can neither be made available to the Treasurer of the Commonwealth nor applicable, in such part as may be so, to satisfy any claim that you have, upon the assumption of the validity of your contract.

I wrote you, in view of this unfortunate, and, I confess, unexpected attitude of yours, that if you adhered to it the Governor and Council would doubtless take such action in the premises as should be deemed necessary to protect the interests of the State, of which you would be advised. This action was not to be a determination on the validity of your contract, but such as is made necessary by what I consider to be a breach of its vital provisions, if it be a valid agreement. I have already said in the plainest terms to the gentlemen representing you that while you adhere to a position which, plainly upon its face, to my mind shows a non-performance of your assumed contract, there can be, so far as I am concerned, no communication touching the validity of the contract itself; nor should I deem it consistent with the position that I must maintain to discuss with you or to make intimation to you what view I hold as to the validity of the contract itself. Presupposing its validity, and in order to enable you to have any rights or to take any benefit under it, I need hardly say to a lawyer that a contract must first be performed in its every detail. I repeat that the action to which I referred in my letter to you to be taken by the Governor and Council has no relation to any declaration as to my own view of your rights under the alleged contract, but only to such action as might

become necessary through your own refusal to perform a contract upon which you assert your rights depend.

I am very respectfully yours,

(Signed) HERBERT PARKER,
Attorney-General.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–10.

JUNE 6, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

MY DEAR MR. ATTORNEY-GENERAL: — I have the honor to acknowledge the receipt of your kind letter bearing date May 31, but received by me on the 3d instant.

I note that you do not say that your letter is written by request of the Governor in response to my letter to him of May 28, a copy of which, out of deference to you, I enclosed you. I assume, therefore, that you mean me to take this merely as an expression of your personal views, and not as the answer of the Governor. Of course I do not say to you that mine of the 28th was addressed directly to the Governor, not through any want of respect to you, but because legal formalities sometimes require communications should be directed to the client rather than through the attorney. I am awaiting His Excellency's reply to my letter, and will defer further answer to yours until I have received the same.

In saying this, I want emphatically to disclaim any discourtesy, intentional or otherwise, to you, and I trust you will so receive it.

With personal regards,

I am yours very respectfully,

JOHN B. COTTON.

OFFICE OF THE CL
RECEIVED
DEC 29 1904
SUPREME COURT

FILE COPY.

Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No. 15.

In Re COMMONWEALTH OF MASSACHUSETTS,
PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION.

HERBERT PARKER,
Attorney-General of Massachusetts.

FREDERICK H. NASH,
Assistant Attorney-General of Massachusetts.

Office Supreme Court U. S.
FILED
JAN 3 1905
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No.

In Re COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION.

STATEMENT OF THE CASE.

Congress, on the twenty-seventh day of April, 1904, appropriated $1,611,740.85 to the Commonwealth of Massachusetts on account of the Commonwealth's expenses in defence of the Union. The Secretary of the Treasury, Leslie M. Shaw, drew a warrant for that sum, payable to the Governor of Massachusetts or order, and delivered it to John B. Cotton of Washington, D. C., who claimed to be entitled to receive from the Commonwealth of Massachusetts 10 per cent. of that amount, under a contract with Massachusetts whereby he was made its agent and attorney to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States, the claim of Massachusetts upon which that appropriation was based. This delivery was without notice to

any one else representing Massachusetts, although only the Governor was authorized to receive payment of the warrant. John B. Cotton, claiming a lien on the fund appropriated and on the warrant, for 10 per cent. of that amount, refused to turn over the warrant to the Governor until his claim should first be satisfied. The Governor demanded a duplicate warrant, but the Secretary of the Treasury refused to issue one, taking the position that his duty permitted him to assist a claim agent to coerce his client into settling all questions that might arise between them, at the agent's own terms. Upon the Governor's request, however, he took the opinion of the Attorney-General of the United States in the matter, and was advised that he should issue a duplicate warrant and deliver it to the Governor.

The same day of the Attorney-General's opinion, and before the Governor of Massachusetts was advised of it, and before the Secretary of the Treasury could issue a new warrant, John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity in which the Secretary of the Treasury and the Governor of Massachusetts were named as defendants, setting forth his contract with the Commonwealth of Massachusetts and asserting that he was entitled to enforce a lien upon the original warrant in his possession by perpetually restraining the Secretary of the Treasury from issuing a second warrant, and restraining the Governor of Massachusetts, or any one else in behalf of Massachusetts, from asking or receiving one. At once the Supreme Court of the District of Columbia issued a rule commanding the parties named as defendants to show cause why they should not be thus enjoined. No service upon the Governor of Massachusetts was made or attempted. Neither he nor the Commonwealth of Massachusetts has appeared in the suit. Upon the return day of the rule, Nov. 22, 1904,

the hearing thereon was indefinitely postponed. This equity suit is still pending.

To remove the unlawful restraint upon the Secretary's conduct, effected by the action of the Supreme Court of the District of Columbia in taking jurisdiction of the equity suit, this petition is brought.

I.

The Supreme Court of the District of Columbia has no Jurisdiction of John B. Cotton's Bill in Equity.

This appears upon the face of the bill. The only standing which the plaintiff asserts therein is his right under his contract with the Commonwealth of Massachusetts. Whether that contract gave him any right is a question which can be determined only in the courts of Massachusetts, where alone the Commonwealth of Massachusetts has consented to be impleaded.

Eleventh Amendment to the United States Constitution.
Revised Laws of Massachusetts, c. 201.
Hans *v.* Louisiana, 134 U. S. 1.
Smith *v.* Reeves, 178 U. S. 436.

It is obvious that the Commonwealth of Massachusetts has such an interest in the question whether John B. Cotton may have the Secretary of the Treasury enjoined from issuing the warrant to it in payment of the appropriation by Congress that it is an indispensable party to the suit; yet neither it nor the Governor representing it can be made a party, nor can any officer representing it consent to jurisdiction over it by the Supreme Court of the District of Columbia at the suit of John B. Cotton. Therefore, the Supreme

Court of the District of Columbia can make no decree between John B. Cotton and the Secretary of the Treasury.

In *Ribon* v. *Railroad Cos.*, 16 Wall. 446, it is said: —

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and, if any such persons cannot be reached by process — do not voluntarily appear, or, from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties — the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable.

The provisions of the Revised Statutes of the United States, section 738, do not displace the above fundamental principle of jurisprudence.

Gregory *v.* Stetson, 133 U. S. 579, 586.

In this case Mr. Justice Lamar said : —

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that the court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. . . . The point was made . . . that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that notwithstanding the statute referred to (Rev. Sts., §738), and the forty-seventh equity rule, a Circuit Court can make no decree in

a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields* v. *Barrow*, 17 How. 130, 141, 142; *Coiron* v. *Millaudon*, 19 How. 113, 115, and cases there cited.

In *California* v. *Southern Pacific Railroad Co.*, 157 U. S. 229, 249, *et seq.* the Chief Justice, dismissing an original bill for want of parties who ought to be joined but could not be joined without ousting the jurisdiction of the court, said: —

It was held, *Mallow* v. *Hinde*, 12 Wheaton, 193, 198, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another State; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply equally to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

See also Minnesota *v.* Northern Securities Co., 184 U. S. 199.
Daniell's Chancery Practice (3d Am. Ed.), pp. 285, 286.

The difficulty goes to the jurisdiction of the court, and when it appears on the face of the bill it is not a mere matter of defence, but requires the court to refuse to entertain the bill.

In *California* v. *Southern Pacific Railroad Co.*, *supra*, Mr. Justice Harlan, dissenting, in stating the effect of the court's decision, said: —

> Upon that ground alone it is held that we are without jurisdiction to pass a final decree as between the State and the defendant corporation.

The necessity, in a bill of this nature, of having both parties to the contract before the court and subject to its jurisdiction is pointed out in *Price* v. *Forrest*, 173 U. S. 410, and in *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 253.

[*Note.*— The case of *McKee* v. *Lamon*, 159 U. S. 317, is not in point, because there it appeared that the Choctaw nation had, by resolve of its council, recognized the contract with its agent as valid and had appropriated the amount of its agent's percentage fee thereunder, to the satisfaction of the contract obligation, and the whole percentage fee had been paid to one agent although another was entitled to share in it. The controversy was solely between the two agents, and, as the court pointed out (page 322), the Choctaw nation had no longer any interest in the percentage fee.]

The application to our case of the principle illustrated by the above cases, that a court of equity has no jurisdiction in a suit by A against X to pass upon A's rights under his contract with B, unless B also is a party to the suit, is not in the least affected by the familiar line of cases, beginning with *Osborn* v. *Bank of United States*, 9 Wheat. 738, containing dicta that although a State may have an interest in a suit, a federal court whose judicial power does not extend to suits against a State may take jurisdiction in the State's absence from the record.

At the present stage of this case it is enough to say that a State is not an indispensable party or even a proper party

to an action *at law* in which its agent is sued on account of some act which he personally was charged with doing, or to a bill in equity to restrain its agent from enforcing an unconstitutional statute. The agent may not excuse himself for what he has done to the plaintiff's injury, or for refusing to do his duty toward the plaintiff by suggesting that the State is really the party interested, or by pleading a void State statute.

Osborn *v.* Bank of United States, 9 Wheat. 738.
United States *v.* Lee, 106 U. S. 196.
Pennoyer *v.* McConnaughy, 140 U. S. 1.
Reagan *v.* Farmers' Loan & Trust, 154 U. S. 389.
Scott *v.* Donald, 165 U. S. 108.
Tindal *v.* Wesley, 167 U. S. 204.
Smyth *v.* Ames, 169 U. S. 517.
Illinois Central R.R. *v.* Adams, 180 U. S. 28.
Missouri R.R. Co. *v.* Missouri Railroad Commissioners, 183 U. S. 53.

But when a State is so connected with a controversy in equity that, were it subject to the jurisdiction of the court, its joinder would be indispensable, the suit may not be entertained at all. The court is without jurisdiction.

Cunningham *v.* Macon & Brunswick R.R. Co., 109 U. S. 446.
Hagood *v.* Sothern, 117 U. S. 52.
See *In re* Ayers, 123 U. S. 443.
Louisiana *v.* Jumel, 107 U. S. 711.
Belknap *v.* Schild, 161 U. S. 10.
Fitz *v.* McGhee, 172 U. S. 516.

Illinois Central R.R. Co. v. *Adams*, 180 U. S. 28, in which Mr. Justice Brown discussed whether the objection that the action could not be prosecuted on account of the Eleventh

Amendment ought to be raised by motion to dismiss or by plea, was of the former class. From the bill on its face it did not appear that the State was an indispensable or even a proper party. It was a bill in equity against a State railroad commission to restrain it from approving and certifying an assessment for taxes, and against a revenue agent to restrain him from bringing any suit for the recovery of such taxes. Upon the face of the bill the Circuit Court had jurisdiction, it being a suit against the particular State officers who were charged with the enforcement of a State statute alleged to be in violation of the United States Constitution. (See *Smyth* v. *Ames*, 169 U. S. 517. Compare *Fitz* v. *McGhee*, 172 U. S. 516.) The present case is so palpably an attempt to adjudicate in an equity suit the validity and effect of a contract without bringing the other party to the contract before the court that the point which we raise belongs to the jurisdiction and not to the merits. The Supreme Court of the District of Columbia would have no jurisdiction of the bill were the other party to the contract an individual not actually or constructively before the court. It certainly gains no jurisdiction from the fact that the Commonwealth of Massachusetts, instead of such individual, is the other party to the contract.

When, therefore, John B. Cotton's bill was filed and a rule asked for, the court had no power to do anything except to dismiss the bill or order it stricken from the files. In courts of equity the power has always existed to refuse to entertain frivolous and vexatious bills, leaving to the complainant his remedy by mandamus to compel the court to take jurisdiction if the court was mistaken.

1 Daniell's Chancery Practice, 1st Ed., 402, 409, 461.

Brinkley v. Louisville & Nashville R. R. Co., 95 Fed. 345.

That power ought to have been exercised in the present case, where to entertain the bill was an unconstitutional affront to a sovereign State.

II.

The Remedy of the Commonwealth of Massachusetts for the Usurpation of Jurisdiction by the Supreme Court of the District of Columbia is by Writ of Prohibition to the Judges of that Court, restraining them from holding the Cause further before them, or by Writ of Mandamus to compel them to dismiss the Bill.

It is true the Commonwealth of Massachusetts might disregard any orders of the Supreme Court of the District of Columbia and apply to this court, under its original jurisdiction of suits by a State against citizens of another State, for a writ of mandamus to the Secretary of the Treasury to compel him to pay the appropriation of Congress.

See United States *ex rel.* Miller *v.* Black, 128 U. S. 40.

United States *ex rel.* Redfield *v.* Windham, 137 U. S. 636.

United States *ex rel.* Boynton *v.* Blaine, 139 U. S. 306.

Roberts *v.* United States, 176 U. S. 221.

But that seems not an appropriate remedy when the Secretary of the Treasury is ready to do his duty in that regard, except for the unlawful interference by the Supreme Court of the District of Columbia. It should be resorted to only if he hesitates after the interference is removed by this proceeding. Such action by the Commonwealth would not be a remedy in the suit, but an independent proceeding in disregard of the suit.

If the Commonwealth of Massachusetts does nothing, and the Supreme Court of the District of Columbia, in the course of time, dismisses the plaintiff's bill, he will have an appeal to the Court of Appeals, and, after that, to this Court. Should the Supreme Court of the District of Columbia make a decree in conformity with the prayer of the bill, it might be that the Secretary of the Treasury would not feel himself aggrieved and would not appeal.

The Commonwealth of Massachusetts cannot voluntarily appear in the suit and plead to the merits. Its acquiescence would not give the federal court a jurisdiction, which is forbidden by the Eleventh Amendment. A decree in its favor would not be a bar to another suit by John B. Cotton in the only court of competent jurisdiction, the Superior Court of Massachusetts. Besides, no officer of Massachusetts has authority to consent that it be sued outside its own court.

U. S. *v.* Lee, 106 U. S. 196, 205.

Suppose the Commonwealth of Massachusetts should appear specially and move to dismiss the suit for lack of jurisdiction. John B. Cotton would have his tedious appeals from a decree dismissing the bill, while from a decree overruling its motion, the Commonwealth, it seems, would have no appeal.

Georgia *v.* Jesup, 106 U. S. 458.
South Carolina *v.* Wesley, 155 U. S. 542.

It cannot be the law that a State which cannot be made a party before the federal court may have its rights affected by a suit like the present, unless, by a suggestion made to that very court, it succeeds in getting the suit dismissed.

Such a suggestion is not necessary as a preliminary step

before applying for prohibition when the lack of jurisdiction appears on the face of the proceedings below.

Bacon Ab., Title Prohibition, K.

See an elaborate discussion of this point in *Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, 275–292.

Judicial procedure in the United States would be liable to great reproach if it did not afford a prompt and effectual remedy at once to put an end to an action brought in violation of the Constitution of the United States and of the universal principle by which all civilized countries are governed, that a sovereign can be sued only by its own consent.

The great delay attending the reversal in the usual way of a decree made without jurisdiction has been held in this court sufficient reason for resorting to an extraordinary remedy.

Gaines *v.* Rugg, 148 U. S. 228, 243.

The Commonwealth of Massachusetts asserts that, being an indispensable party to a suit in which it cannot be impleaded, it is entitled, as of right, having no other adequate remedy, to a writ of prohibition or a writ of mandamus.

Shortt on Prohibition, pp. 440, 455.

Were this the Court of King's Bench in England, all the questions arising upon the petition would be concluded by authority of *In the Matter of Wadsworth and the Queen of Spain* and *In the Matter of De Haber and the Queen of Portugal*, 17 Q. B. 171. These were applications to the Queen's Bench for writs of prohibition to the Lord Mayor's Court of the city of London. One Wadsworth sued the Queen of Spain in the Lord Mayor's Court for interest on Spanish government bonds, and attached money of the Span-

ish government in the hands of London bankers, garnishees. De Haber sued the Queen of Portugal for money taken from him by the Portugaese Government under a court decree, and attached funds of that government in the possession of London bankers, garnishees. In the case of the Queen of Spain, the garnishees applied for the writ of prohibition, while the Queen of Portugal herself, without appearing before the Lord Mayor's Court for any purpose, applied for the writ.

It was argued against the rule to show cause, in substance as follows: —

Assuming that in some stage of the case the queen might interpose and allege something to defeat the action, a prohibition cannot go. The Lord Mayor's Court has jurisdiction in this kind of a proceeding. No application has been made to the Lord Mayor's Court, because the queen cannot be sued there. If the objection is taken on trial, the Lord Mayor's Court will deal with it and it may be brought before a court of error. The proper mode of defence on the part of the queen would have been to appear and put in a plea. The present question is not between the plaintiff and the queen, but between the plaintiff and the garnishee. The defendant cannot have a prohibition, for want of jurisdiction before appearing in the inferior court, and the garnishee, to take advantage of the objection, should plead it there. The prohibition will then go, if the inferior court refuse the plea, so as to show unequivocally an intention to exceed the jurisdiction.

At the close of the argument the Lord Chief Justice, Lord Campbell, said (page 203): —

We will take time to consider our judgment. But without prejudice to any point which has been argued in this case, I must express very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie; and I am very

sorry to find that this has been persisted in. The only question is as to the proper mode of stopping it, whether by a plea in the court below or by prohibition.

Application for prohibition was made April 15, 1851. Lord Campbell delivered the judgment of the court, making the rule absolute in both cases, May 28, 1851. The Lord Chief Justice said (page 207): —

An action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of a nation of which he is the head; and that no English Court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity is contrary to the law of nations, and an insult which he is entitled to resent.

(Page 214:) We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. . . . It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her, which would be a further indignity and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself. . . . What has been done in this case, by the Lord Mayor's Court, must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British Government and having a tendency to bring about a

misunderstanding between our own gracious Sovereign and her ally, the Queen of Portugal. Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

(Page 219:) Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors and the principles by which they have been guided, to grant the relief which is prayed. If we had entertained any grave doubt upon the subject we should have directed the applicant to declare in prohibition; but being clearly of opinion that there is an excess of jurisdiction in the Court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.

The principle of these cases is precisely the same as that of the present application. The suit which the Commonwealth seeks to prohibit is a perverted garnishment in which the plaintiff, by asserting a lien on the warrant, tries to tie up money due from the United States to the Commonwealth of Massachusetts.

In England nothing except the unwritten law of international comity denied to the Lord Mayor's Court jurisdiction of such suits against the property of an independent sovereign. Yet Justice Willes said of those two suits that the entertainment of them brought scandal upon the law of England. (*Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, at 267.) The Commonwealth of Massachusetts cannot apply to the State department and complain against this affront to its sovereignty in the courts of the District

of Columbia, because when it came into the Union it yielded the right to deal thus with the diplomatic head of the District of Columbia. But in return for the rights which it gave up it received under the Constitution, according to its true interpretation, now secured by the Eleventh Amendment, protection of the right not to be made to suffer delay and outrage from the pendency of a suit against it, directly affecting its public funds, in a court of the District of Columbia. The only power which it can invoke is the power of the Supreme Court of the United States to declare, and make its declaration promptly effective, that by no indirect abuse of this assumed jurisdiction can the guaranteed right of a sovereign State be delayed and obstructed.

III.

The Supreme Court of the United States has Jurisdiction to issue the Writ of Prohibition in the Present Case.

The Supreme Court has power to issue a writ of prohibition, not only to the district courts proceeding as courts of admiralty and maritime jurisdiction under the express authority of Revised Statutes, section 688, but also, in the exercise of "inherent general power," to the courts of the District of Columbia when it is the appropriate remedy. The quoted phrase is from the opinion of the Chief Justice in *In re Vidal*, 179 U. S. 126; see also *Ex parte Joins*, 191 U. S. 93.

If express authority be needed, other than that existing in the Constitution of the United States, Article III., and the creation of the Supreme Court of the United States and the Supreme Court of the District of Columbia, with their respective powers, it may be found in Revised Statutes, section 716: —

The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

This statute is construed by this court to mean, not the exclusion of power to issue such writs, unless they are necessary for the exercise of its appellate jurisdiction, but the grant of power to issue them when agreeable to the usages and principles of law, as well as when necessary for the exercise of its jurisdiction.

See the opinion of the Chief Justice in *In re* Chetwood, 165 U. S. 443.

By section 14 of the Judiciary Act of Sept. 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District courts were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Co.* v. *Jacksonville Railroad Co.*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari.

Since the Chief Justice, in the later case of *In Re Tampa Suburban Railway*, 168 U. S. 583, has hinted that the issuance of the writ in *Chetwood's case* was really because it was necessary for the exercise of the appellate jurisdiction

of the Supreme Court, and since the only case in which the writ of prohibition has been held suitable to any court other than a district court sitting as a court of admiralty and maritime jurisdiction (*Bronson* v. *LaCrosse Railroad Co.*, 1 Wall. 405) may be put upon the same ground, it seems that it has never become necessary for this court to decide whether it may issue such a writ to an inferior federal court other than a District Court when the writ is agreeable to the usages and principles of law as demonstrated in the Court of King's Bench in England.

In every case in this court where the remedy of prohibition has been denied, there has been a meritorious reason for denying it, without dealing with the court's jurisdiction to issue it.

The cases, taking them up in chronological order, are as follows: —

Ex parte Christy, 3 How. 292 (1845):

Petition for prohibition to the district court sitting as a court of bankruptcy. Denied, because the district court had jurisdiction of the case before it.

Ex parte Gordon, 1 Black, 503 (1861):

Petition for prohibition to the circuit court in a capital case of piracy. Denied, because the circuit court had jurisdiction.

Bronson v. *LaCrosse Railroad Co.*, 1 Wall. 405 (1863):

An appeal was taken to the Supreme Court of the United States from an order of a district court in an equity suit to foreclose a railroad mortgage. Notwithstanding the appeal the district court proceeded to enforce the order. On application for the writ of prohibition the court withheld the writ to give the lower court opportunity to desist in accordance with the opinion, leave being given counsel, however, to

apply for the writ if necessary. Held, that the district court had no jurisdiction.

United States v. *Hoffman*, 4 Wall. 158 (1866):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the application was made too late, the district court having already disposed of the case.

Ex parte Graham, 10 Wall. 541 (1870):

Petition for prohibition to a district court which had taken jurisdiction of a proceeding *in rem* to confiscate real estate under the act of July 7, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, etc." The act declared that such proceedings should be *in rem*, and should conform as near as may be to proceedings in admiralty. Petition denied. The court said that it had no authority to issue a writ of prohibition except to district courts when proceeding as courts of admiralty, thus disregarding *Bronson's case*, 1 Wall. 405; but it is apparent that under the statute the district court had jurisdiction of the proceeding *in rem*.

Ex parte Warmouth, 17 Wall. 64 (1872):

Petition for prohibition to the circuit court in equity. This court had restrained one McEnery from acting as governor of Louisiana or setting up any claim to that office, upon a petition by his political adversary who had received the next highest number of votes, brought under the statute of May 31, 1870 (16 Stat. at L. 140), an act to enforce the right of citizens of the United States to vote in the several States of this union, and for other purposes. The petition was denied because an appeal was the proper remedy, the court below being expressly given jurisdiction by the statute. The statute provided, in section 23, that when any person was deprived of his election to any office by reason

of the denial to any citizen of his right to vote, on account of race, color or previous condition of servitude, he might bring any appropriate suit to recover possession of the office, in the circuit court of the United States, and provided that the circuit court should have, concurrently with the State court, jurisdiction thereof.

Ex parte Easton, 95 U. S. 68 (1877):

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from proceeding to enforce a lien for wharfage. Denied, because the district court had jurisdiction, the contract for wharfage being a maritime contract. Whether the lien existed was, therefore, a question for its determination.

Ex parte Gordon, 104 U. S. 515 (1881):

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from assessing damages for the death of a person, caused by maritime tort. Denied, because the district court had jurisdiction.

Ex parte Ferry Co., 104 U. S. 519 (1881):

This case is similar to *Ex parte Gordon*, *supra*, except that the amount of damage assessed was too small for appeal. The court said: —

> If there is jurisdiction and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort and concludes the parties.

Ex parte Hagar, 104 U. S. 520 (1881):

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction, the matter in dispute being a pilot's claim.

Ex parte Slayton, 105 U. S. 451 (1881):

Petition for prohibition to a district court sitting as a court

of admiralty. Denied, because the court had jurisdiction of a petition to limit liability.

Ex parte Pennsylvania, 109 U. S. 174 (1883):

This case is like *Ex parte Hagar*, *supra*.

Ex parte Boyer, 109 U. S. 629 (1884):

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

Chesapeake & Ohio Railroad Co. v. *White*, 111 U. S. 134 (1883):

Petition for prohibition "or such other proceeding as may be deemed appropriate" to a State court, and the plaintiffs therein, prohibiting them from further proceeding in a suit in which the petitioner was defendant, on the ground that the cause had been properly removed to the federal courts, and that the substantial rights of the parties were involved in a suit pending in the Supreme Court, namely, a writ of error to the highest State court, the Court of Appeals, which, by mandamus, had ordered the State court to proceed with the case. Petition denied in substantially the following language: —

Our proceedings in this suit must be confined to such as relate to a review of the judgment of the Court of Appeals and the enforcement of any order we may make upon the final hearing. The judgment of this court would not be a prohibition to the State court against proceeding, but only a refusal to order it to proceed. If a mandamus were refused by this court on the writ of error the plaintiff below would not be guilty in law of contempt if, notwithstanding refusal, he applied again to the State court to proceed to the trial. The State court did not abandon its jurisdiction. It still retained the suit. If a sufficient cause for removal was made in the State court, the rightful jurisdiction of that court is gone and cannot properly proceed further; but if it does proceed and does force the

defendant who applied for the removal to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt.

Ex parte Phenix Insurance Co., 118 U. S. 610 (1886):

Petition for writ of prohibition to the district court sitting in admiralty to restrain it from taking further jurisdiction of a petition by the owner of a steam vessel for the trial of the question of his liability for damage caused to buildings on land, by fire set by sparks from the vessel's smoke-stack. The writ issued because the court had no jurisdiction, the tort not being a maritime tort. The court said: —

> The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings.

In re Baiz, 135 U. S. 403 (1890):

Petition for prohibition to the district court to restrain it from proceeding with a suit for libel against the petitioner, who claimed to be a public minister. Denied, after full consideration of the merits, the facts showing that the petitioner was not a public minister, because the court had jurisdiction against him.

In re Cooper, 138 U. S. 404 (1890):

Petition for prohibition to a district court sitting as a court of admiralty. A rule was issued to show cause.

In re Garnett, 141 U. S. 1 (1890):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability for loss on the Savannah River.

In re Fassett, 142 U. S. 479 (1891):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Cooper, 143 U. S. 472 (1891):

This is the same case as *In re Cooper*, *supra*, heard upon the return of the rule to show cause. Petition denied, because the petitioner had an adequate remedy by appeal, *which, through negligence, he had failed* to secure. The district court had jurisdiction.

In re Engles, 146 U. S. 357 (1892):

This case is like *In re Fassett*, *supra*.

In re Morrison, 147 U. S. 14 (1892):

Petition for prohibition and mandamus. Both denied, — mandamus because the petitioner had an adequate remedy in the ordinary course; prohibition because the court below had jurisdiction. The suit was a libel to limit liability. The court said: —

> As the District Court of Massachusetts had jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition would be issued only in case of a want of jurisdiction, either of the parties or of the subject-matter of the proceeding.

In re Rice, 155 U. S. 396 (1894):

Petition for a writ of prohibition to a circuit court to prohibit it from further proceeding upon a receiver's petition, and for a writ of mandamus directing the circuit judge to restore the parties to their original positions and thereafter to proceed according to law. The court decided the case upon the merits, without discussing the question of jurisdiction. Fuller, C. J.: —

> Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.
>
> 1. Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled

to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a *stranger, the granting or refusal of the* writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.

2. The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, 379.

In re New York, etc., Steamship Co., 155 U. S. 523 (1894):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Alix, 166 U. S. 136 (1896):

Petition for prohibition to a district court sitting as a court of admiralty, brought by an intervenor in a libel. Denied, under the test of the quotation in *Rice's case, supra.*

In re Huguley Mfg. Co., 184 U. S. 297 (1901):

Petition for prohibition to a circuit court to restrain it from taking any further steps in a bill ancillary to a bill of foreclosure, and for mandamus requiring a circuit court to dismiss the bill. Fuller, C. J.: —

It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the

outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633.

And it may be added that it is also the general rule as to the writ of certiorari when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

In this case there was under the act of Congress of June 6, 1900, 31 Stat. 660, c. 803, a plain and adequate remedy by appeal to the Circuit Court of Appeals for the Fifth Circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within section 5 of the act of March 3, 1891; or to the Circuit Court of Appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *In re New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 531.

Ex parte Joins, 191 U. S. 93 (1903):

Petition for prohibition and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw Citizenship Court. Denied, because the cause in the Citizenship Court was ended before the present application was heard. Holmes, J.: —

It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied irrespective

of these questions. We need not consider whether the jurisdiction of this court to grant a writ of prohibition to the District Courts is confined to cases where those courts are "proceeding as courts of admiralty and maritime jurisdiction." Rev. Stat., § 688; *Ex parte The City Bank of New Orleans*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 68. As to the jurisdiction in other cases, whether inherent or under Rev. Stat., section 716, see *In re Rice*, 155 U. S. 396; *In re Hagaley Manufacturing Co.*, 184 U. S. 297; *In re Chetwood*, 165 U. S. 443, 462. Again we need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *In re Vidal*, 179 U. S. 126; *Gordon* v. *United States*, 2 Wall. 561; *S. C.*, 117 U. S. 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended before the present application was heard.

It is insisted, in view of the elaborate discussion of these applications for prohibition in late years, that the dicta of the early cases, to the effect that the Supreme Court of the United States has no authority to issue a writ of prohibition to a district court except when it is sitting as a court of admiralty, or to lower federal courts generally except in cases where the issuance may be necessary for the exercise of this court's jurisdiction, are not now to be regarded, and that this court has full authority to issue the writ whenever its issuance is agreeable to the usages and principles of law.

It is, however, unnecessary to decide whether the Supreme Court of the United States has jurisdiction to issue a writ to the circuit court of the United States or to any court other than inferior courts of the District of Columbia. As the highest judicial tribunal within the District of Columbia, from the analogy which it bears to the highest court of Maryland, it has the same power over inferior courts of the District of Columbia that the highest court of Maryland

had, at the time of the creation of the District of Columbia, over its subordinate tribunals.

See United States *v.* Schurz, 102 U. S. 378.

At the time the District of Columbia was created, the highest court of Maryland had all the powers of the Court of King's Bench in England.

Runkel *v.* Winemiller, 4 Harris & M'Henry, 449.

Price *v.* State, 8 Gill, 295, 310.

Kendall *v.* United States, 12 Peters, 524, 620, 631.

The common law of Maryland remained in force in the District of Columbia.

Kendall *v.* United States, 12 Peters, at pp. 614, 621.

The power of the proper tribunals in the District of Columbia to issue writs of prohibition has never been taken away by statute.

See Smith *v.* Whitney, 116 U. S. 167, at p. 175 (semble).

Deffer *v.* Kimball, 7 App. D. C. 499.

The decision in *Marbury* v. *Madison*, 1 Cranch, 137, that Congress had no power to extend the original jurisdiction of this court to writs of mandamus against executive officers, has no application to this court's authority over *constitutional courts* subordinate to it within the District of Columbia.

IV.

If, as we contend, the proper remedy for the Commonwealth of Massachusetts is prohibition, and, if necessary, certiorari in aid of it, it is immaterial to consider whether

mandamus will lie to compel the judges of the Supreme Court of the District of Columbia to dismiss the Cotton bill.

But if this court declares that it has no jurisdiction to issue a writ of prohibition in the present case, then we contend that the only adequate remedy is a writ of mandamus, as prayed in the petition.

Revised Statutes, section 688, provides: —

> The Supreme Court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States or to persons holding office under the authority of the United States where a State or an ambassador or other public minister, or a consul or vice-consul, is a party.

It is elementary that mandamus is the proper remedy to require a court to assume jurisdiction of a case which properly belongs to it, or to decide a matter which is properly before it.

Hollon Parker, petitioner, 131 U. S. 221.
Chateaugay Iron Co., petitioner, 128 U. S. 544.
Ex parte Parker, 120 U. S. 737.
Ex parte Morgan, 114 U. S. 174.
Ex parte Burtis, 103 U. S. 238.
Ex parte Railway Co., 101 U. S. 711.
Ex parte Flippin, 94 U. S. 348, 350.
In re Hohorst, petitioner, 150 U. S. 653.

Since it is the proper remedy to compel a court to assume jurisdiction, where it possesses it, it is the proper remedy and should issue to compel a court to dismiss a case where it does not possess jurisdiction, *if the petitioner has no remedy by appeal, writ of error, or writ of prohibition.*

In *Virginia* v. *Rives*, 100 U. S. 313, this court issued a mandamus to the judge of a circuit court requiring him to

deliver two negroes to the State jailer. The State prosecutions against them had been removed into the federal court, which had taken jurisdiction of them without authority. The petition for removal showed on its face that the circuit court had no jurisdiction. The court said that mandamus is a remedy when the case is outside of the exercise of the inferior court's discretion and outside of the jurisdiction of the court; that one of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.

See also *Ex parte* Bradley, 7 Wall. 364, 375, *et seq.*
Ex parte Newman, 14 Wall. 152, 165.
In re Washington & Georgetown Railroad, 140 U. S. 91.
Gaines *v.* Rugg, 148 U. S. 228.
In re Grossmayer, 177 U. S. 48.

V.

The principle upon which our petition rests we believe to be one of the most important to the dignity of Massachusetts that our Commonwealth has ever asserted before any tribunal. That it may not be determined against Massachusetts upon this summary brief, but may be fully and adequately argued, we earnestly submit that we should be granted leave to file the petition and that a rule ought to issue in accordance with the prayer.

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